The General Practitioner

Newsletter of the State Bar of Michigan General Practice–Solo and Small Firm Section

Volume 38, Number 6 November/December 2014

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EDITOR'S NOTES

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Readers are invited to submit their own articles, comments and opinions to Maury Klein, Editor, PO Box 871567, Canton, Michigan 48187. Publication and editing are at the discretion of the editor.

This newsletter will be published six (6) times per year by the General Practice Section of the State Bar of Michigan to inform members of the section activities and other matters of particular interest to general practitioners.

E-Discovery

By Odey K. Meroueh

The ubiquity of the smart phone has made it necessary for solo and small firm attorneys to adapt to the e-discovery age. More than half of Americans own smart phones and the plethora of information contained and retained by each of these devices is staggering. Attorneys who take the time to understand the issues presented below and continually update their technological knowledge will unlock a wealth of resources obtainable only through the use of e-discovery.

What is E-Discovery?

E-discovery (electronic discovery) is the legal process by which litigants discover and/or produce documents stored through electronic formats in response to litigation. Anyone who has experienced the difference between endless stacks of paper and a searchable organized electronic database of records understands why the world is headed toward a paperless zeitgeist. As the world approaches this precipice, e-discovery becomes exponentially more important to the litigating attorney.

E-Discoverable?

Many of the attorneys reading this article are doing so on an Android or iPad/iPhone device. These same attorneys use these devices throughout their everyday life to send e-mail, browse the web, plan their schedules, etc. People who become involved in litigation equally use said devices. If an attorney is not striving to discover the potential treasure trove of content contained on these devices, he is doing his clients a major disservice.

Due to the popularity of smart phones, potential litigants are travelling with enormous amounts of electronic information stored in their pockets. The world of discovery is no longer confined to the traditional, and as the tides change the following only scratches the surface of potential sources of discoverable information:

- Instant messaging records
- Voicemails
- Videos
- Call history
- Chat client history
- Internet browsing history
- Social media posts and messages
- Application data
- GPS data (location history)
- E-mail records
- Images (and embedded metadata)

Technophobia—Not an Option!

Attorneys who have not yet purchased a smart phone should do so immediately! There is no better way to learn about the various discoverable aspects of the mobile or tablet device than to buy one and experience it firsthand. The more you use your smart phone and tablet, the more you will be able to understand how and why litigants might use their device, and how that could be helpful to your big case.

Android v. Apple, 01 SoloFirm 100 (2014)

Which to choose? More experienced users tend to opt for the Android phone as it offers the most customizability; however, those words are blasphemous to most ardent Apple users who champion their device as regent in the war of smart phones. Apple definitely offers the most intuitive or easy-to-use devices; however, Android is closing the gap on Apple in that regard with the new Android L operating system forthcoming. For the purposes of E-Discovery, either choice is adequate in your quest to become knowledgeable in the area. Both devices provide the full gamut of applications and processes that record almost every move their user makes.

Mining for Gold

Why have small-firm attorneys resisted e-discovery in the past? One major factor has been the prohibitive cost.

With such massive amounts of information to discover, inevitably there exists a large amount of irrelevant information to sift through. It takes intense and sustained focus and effort to locate the nuggets of informational gold that could be the deciding difference for your client during litigation. In the past, this is where the solo or small-firm attorney would become priced out as compared to the larger firms. The solo lawyer who receives gigabytes of data to sift through would have to spend a prohibitive amount of time

trying to determine what was relevant to the case at hand. These hours would translate into a bill that most clients of solo attorneys are not accustomed to paying.

Cost has not been the only fear of attorneys when it comes to e-discovery. Many attorneys see E-Discovery as a time–consuming, perplexingly complicated endeavor. And so, with those trepidations, solo and small firm lawyers have sometimes been forced to forego e-discovery all together.

The Solution: Cloud Based E-Discovery Software

Previously all e-discovery computing software was off-the-cloud based, but that is no longer the case. Gone are the days when you needed to purchase an updated copy of the e-discovery computer program each year. Gone are the days of languishing with bloated and expensive software that you end up rarely, if ever, using.

With the advent of cloud-based e-discovery software, solo and small firms can take advantage of E-Discovery software on an ad hoc basis. Have a major e-discovery project? Sign up for the month-to-month plan and you will have cutting-edge tools at a fraction of the previous cost.

Most cloud-based e-discovery software is able to sift through the irrelevant information automatically, providing you with detailed, sorted, and relevant information for your expert perusal. In fact, software such as NextPoint or eCloud provides users with the ability to collect, analyze, review, exchange, and prep e-discovery materials. And the cost for these and other e-discovery software averages about a billable hour per month (depending on the package selected).

One major bonus of using cloud-based e-discovery software is the customer tutorials and advice offered by the companies who provide the software. These companies know that late-adopting attorneys are hesitant to use complicated software, and they are happy to provide detailed guidance to any subscribing attorney in need. Most of these companies offer these services for free, so take advantage while they do!

The time for burying one's head in the sand is over. You need to start thinking about what you will do when the time arises for you to obtain or provide e-discovery. Start now!

Special Practice Tip: Update Your Litigation Hold Notices.

It is time to dust off those old litigation hold notice templates and update them to include e-discovery materials. The last thing you want is for a controversy surrounding whether or not an obligation to preserve e-materials existed. Save your client and yourself the grief and update those templates! ■

About the Author

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A New Direction

From the Editor

As of this writing, the process is well underway to change the name of our section by dropping General Practice and changing to "The Solo and Small Firm Section." While the name of the newsletter will continue, we are hoping that the new designation will influence an increase in membership and focus. Our articles will remain widely focused but those who are not exactly G.P.s but rather practice in one or two areas in a solo or small firm setting can find a voice and a home in our section.

Let's start with the seminars we put on. Last year we had a series of programs with topics like "Driver's License Restoration," "Medical Marijuana," and an "Attorney-Judge Crossfire." They were all well received and attended. Remember that these are your programs. You have a say in what programs we put on. "Build it and they will come" is not our guideline. We need you, our members, to let us know what to build (which topics) and how to build it (basic information or intermediate level). As of now, we are looking at these topics again as well as e-discovery, marketing, and others.

All bar sections need to be relevant to assist the membership to better practice, and we have the medium to allow instant exchange of that information—our listserv. All you need do is to post your desires on the listserv and begin the discussion. When we see that there is the need we will try to meet that need. We will grow, and you will practice better and more efficiently. You know what your practice needs. Know also that our seminars are means to network and make other connections.

We are exploring means to expand our membership and want to let one and all know that those who are in the first or second year of practice can join the section and have the $20 dues payment waived. Do your newly admitted lawyer friends a favor and tell them they have a valuable resource at their disposal without charge for up to two years. They need only make a written request to the State Bar or fill it in on their State Bar dues requests.

Turning back to this publication, everything I said regarding seminars holds true for *The General Practitioner*. What topics are you interested in? What area of practice are you interested in? We can accomplish whatever we collectively set our minds toward and work in concert to achieve.

Because it may not be obvious, the ¼ or ½-page announcements you see in *The General Practitioner* are provided to those who contribute articles to the newsletter. If you publish an original article with us, that is our way of saying thanks. I hope to hear from you directly. ■

SLAPP Suits

By William L. Cataldo

Well, attorneys have done it again. Just when you thought we couldn't further marginalize our profession in the public's eye, we outdo ourselves. Another benefit of social media.

Of course, sometimes it isn't without cause and isn't without a proper legal basis. It just, well, makes attorneys look greedy and ruthless, even as they attempt to educate the public about the dos and don'ts of making personal statements on social media.

According to Dallas attorney Shawn E. Tuma, social media and online content litigation is the fastest growing specialty in the United States, with the number of cases filed every month rising since 2007. Tuma speaks to bar associations and legal groups on digital law for lawyers and judges throughout the state of Texas. If you are interested in this area of litigation, or are considering expanding your practice into this growing field, many have suggested you subscribe to his blog for a wealth of practical and useful information.

In fact, it might be a great idea for one of the sections of the State Bar of Michigan to bring him in to eloquently speak on the topic. I understand he is entertaining as well as informative. I learned about this topic and Tuma's website from blogger Deb McAlister, who writes a blog entitled "Marketing Where Technology Intersects Life." Her blog is free, and she has written on a number of interesting topics. Her article on SLAPP lawsuits was an eye opener.

Many people don't understand the potential danger of a lawsuit when writing a product or service review on websites like Angie's List, Yelp, Facebook or on a personal blog. McAlister includes other sites such as Reddit, StumbleUpon, LinkedIn and Twitter. Under the legal theory of tortious interference, the door to be sued is opened if you don't word your complaint properly.

SLAPP stands for "strategic lawsuit against public participation." Wikipedia defines SLAPP lawsuits as "a lawsuit that is intended to censor, intimidate and silence critics by burdening them with the cost of a legal defense until they abandon their criticism or opposition." It is a term first coined by Professors Penelope Canan and George Pring in the 1980s when private interest groups filed lawsuits for significant public interests. But, with the growth of social media, it has morphed into personal lawsuits by small businesses against reviewers, home owners and just plain folks who had the nerve to complain about a product or a service on one of the above sites. Most SLAPP lawsuits would fail if ultimately litigated. But, as previously stated, that is not the aim of these suits.

Wikipedia defines SLAPP lawsuits as "a lawsuit that is intended to censor, intimidate and silence critics by burdening them with the cost of a legal defense until they abandon their criticism or opposition."

These lawsuits chill free speech and healthy debate by targeting those who speak out on issues of public interest. Just as frustrating is knowing the only ones sued are the authors or the bloggers. Most carriers such as Google are exempt from lawsuits based on the content of a statement.

According to Wikipedia, the normal SLAPP plaintiff does not expect to win the lawsuit. The plaintiff's goals are accomplished if the defendant succumbs to fear, intimidation, mounting legal costs, or simple exhaustion and abandons the criticism. A SLAPP lawsuit may also intimidate others from participating in the debate. A SLAPP lawsuit is often preceded by a legal threat. The difficulty is that plaintiffs do not present themselves to the court as their intent to censor, intimidate or silence their critics. Hence the difficulty in drafting legislation and applying it. One way is to craft an approach which affords an early termination to invalid abusive suits, without denying a legitimate day in court to valid good faith claims.

Currently, 20 states have specific laws regulating these types of lawsuits. The laws vary between states but many include the award of costs and early summary disposition opportunities. Michigan is not a state that has SLAPP legislation. No surprise there. Many are calling for the federal government to provide sweeping legislation in this area, but it has not materialized yet.

SLAPP suits take various forms. Aside from tortious interference basis stated above, they commonly masquerade as defamation or business interference tort suits. Civil rights, intellectual property and antitrust have all been used to bring SLAPP suits. Recently, according to the

website Public Participation Project, a union was SLAPP'd by a corporation that alleged that the union's organizing activities constituted a conspiracy under federal organized crime laws.

According to the Public Participation Project, SLAPP targets take a variety of forms. Almost anyone who dares to share an opinion can be SLAPP'd: homeowners and tenants contesting development projects, consumers reporting on products, workers filing complaints about health and safety issues, and, more commonly, people simply complaining about local companies' poor work product or bad food at your local restaurant.

Although the U.S. Constitution and the First Amendment protect freedom of speech, the legal system gives the benefit of the doubt to the plaintiff until completion of the fact-finding stage. And, many times, a winning defendant may not be awarded his legal fees for defending a lawsuit under our current system. According to attorneys Peter Kurdock and Mark Goldowitz, in their excellent article entitled "The Need for Federal Anti-SLAPP Legislation" posted on *www.sitejabber.com*, "SLAPPS aren't just meritless lawsuits. They are lawsuits that directly attack First Amendment rights."

The Digital Media Law Project website defines four areas of law commonly associated with these lawsuits: defamation (by far the most common category, under both libel and slander), interference with contract or economic advantage, intentional infliction of emotional distress, and conspiracy.

How do you protect yourself from a SLAPP lawsuit? The first way is to know your rights. The Constitution generally does not protect against defamatory, threatening or harassing speech.

Tell the truth. Truth is an absolute defense to a defamation claim. That being said, there are still a number of loopholes you need to be aware of before setting off on a rant about someone or something. Do not state rumors or scandalous innuendo, do not speak in generalized, overbroad terms or with speculative rhetoric. Stay with accurate, fact-based statements.

According to the Digital Media Law Project website, and from other sources I have read, a court will not hold you liable for stating an opinion. But, you need to be aware that simply adding the words "in my opinion" before a statement that you can't prove, i.e. "in my opinion the mayor must be taking bribes to have voted for this project" will not be enough to protect you.

Dos and Dont's

Based on the review of Deb McAlister's aforementioned blog, an article she wrote summarizing a number of lawsuits she has reviewed and in perusing a number of articles on the Internet, the following seems to be a good starting point on what to say and how to say it.

Avoid getting personal. Avoid name calling, fighting words, and profanity. Calling a company or an individual a con artist, a scammer, or saying you got taken in by somebody are suspect.

Warning language is another no-no. Avoid terms like: Beware of; Stay away from; Don't do business with; Do not hire; Do not buy; Do not waste money; Scam alert; Don't trust.

Indicating a company lied, misrepresented, promised but did not deliver, did shoddy work, or is the worst company could be deemed defamatory.

Do stay in the first person. Phrases like "I hired," "I found," "I paid," "I thought" are all more acceptable.

Don't say, "Do not eat at Jim's Restaurant. The food will make you sick." Instead, say, "I won't be eating at Jim's Restaurant again after getting sick there last night."

Don't say, "Don't buy lumber from Sam's Lumber because they scammed me out of $400 and sold me warped wood and won't give me a refund." Instead say, "I wish I hadn't bought lumber from Sam's Lumber because the wood was warped."

Don't say, "Don't waste your money with X Contractor. Hire Y Contractor instead." Instead say, "I wish I had hired Y Contractor first. I wasn't happy with X Contractor's work and had to pay Y Contractor to come in and fix things the way I wanted."

There are a number of other examples if you take the time to review some of the articles. I have to admit, I had no idea this was going on. I always look at reviews from everyday people on items I want to buy, places I want to eat, and places I want to rent when my family goes on vacation. I am the first one to admit these unsolicited reviews have an impact on whether I want to stay or eat at a particular place. I didn't know these reviews could lead to such misery, especially if someone wants to be vindictive (which goes both ways). ■

Announcements

Practice Trends: Flat Fee Billing

By Maury Klein

The practice of law grows ever more crowded. Don't believe me? Consider that Wayne State Law School has decided and advertised that they are freezing tuition in order to bolster sagging enrollment. Word is getting out that jobs are not available for the average lawyer fresh out of school. That has happened because of saturation of the field. We in small firm practice have dealt with this reality for a while as we made the decision for one reason or another to hang out our own shingles.

Dealing with this reality sometimes leaves us with choices of clients who have had an attorney before they come to us or are referrals from other firms. Both these choices leave us to deal with clients who are not flush with funds but have every expectation of competent representation.

Most lay people have no understanding of the legal process and its time and money consuming vagaries. They are not interested in the nightmare that is the discovery process. They don't shrug off that older attorneys found out a while ago that filing a motion for more definite statement on a defendant- borrowed-$30,000-and-never-repaid-it complaint will not yield any sanctions. They have heard enough lawyer jokes to distrust us and are wary that some clients pay a large retainer fee and get dumped when it runs out with no end of the case in sight. They want the security of paying a flat fee rather than court costs etc.

Are we in a position to move to flat-rate billing? I think that being in a slimmed-down practice and being able to react to the curves in the practice of law based on a wide

range of experience gives us the inside track. But—and I cannot stress this enough—the practitioner who goes this route must have a track record in the specific type of practice involved coupled with a keen grasp on managing client expectations.

The first concept stemming from experience is the ability to think in terms of case management being a "flow chart." Your client wishes to achieve a result by getting "baby daddy" to pay support. You are in Wayne County. You know that the amount of support will be roughly $650 per month and there will be no FOC recommendation until judgment is entered. You know the forms you have to file and that dad will get visitation. You know whether paternity has been established through affidavit or otherwise so you also know the complaint should be coupled with an ex-parte support motion and (proposed) order.

You have the leverage during initial representation negotiations to set reasonable client expectations into position. These should be part of your price bargaining. If dad is a jerk, he will continue to be a jerk. He will not fall back in love with your client nor straighten up and be a good parent. If his job doesn't offer 5% insurance coverage, the child isn't going to be covered. If dad "quits" his job and works under the table, you can't get child support under your flat fee. Most clients will deal with reality and if he demonstrates that this concept is beyond him, you know this is not the person with whom you want to establish a relationship.

Obviously, there are quite a few variables in dealing with personalities, and some can be eliminated from your consideration quickly. First there is the client who has had more than one other attorney on the case. They are so traumatized that nothing you can do will do. Second is the client who has a case which touches on all sorts of laws and is branching into new areas faster than the universe is expanding. Third is the Client who is cursed by God and fate and is about to launch into the "blow winds" soliloquy from "King Lear." He will never accept responsibility for having made bad choices. And if fortune continues to elude him, it is your fault. Fourth is the client whose cause is rooted in justice. And can never be compromised. Frankly, you should turn and run from all of these as quickly as possible even if on an hourly basis.

Let's review so far: Client with whom you can work, case parameters you are well versed in, and working knowledge of the steps you need to follow. Make a fair projection of the number of trips you will make to court and a couple of hours sitting around for each trip. Is this a matter for case evaluation? Add that into "tell the client about that process" and others to be encountered using your flow chart. Project the costs.

Some things can never be figured in the ballpark like the "Rambo"-style attorney. Sometimes you may end up working for less than your usual hourly wage. You will have corresponding benefits like a certainty of funds earned and securing that client with a lot of competition out there.

Life is always a balance, and flat-rate billing is something we need to consider as an option to keep us in the practice of law. ■

Powers of Attorney

By James Schuster

This is a consumer-focused article that discusses the benefits of an elder's having a durable power of attorney.

Every professional knows the value of a power of attorney for an elder even if not by name. The "advance directive" or "living will" is widely recognized as the legal remedy for control over one's destiny in the face of terminal illness. The patient's instructions are carried out by the "patient advocate" who is acting under a "power of attorney." The vast majority of people who use powers of attorney for elders are loving, caring family members who without the authority could not assist. Powers of attorney are indispensable, but are they also dangerous? In the wrong hands perhaps, but that is a risk with a cure.

Essentially a power of attorney is a simple document granting another person the power to act as the first person's agent or "attorney in fact." The powers granted may be as broad or as narrow as the "principal" chooses. The agent acts only so long as the principal approves, and the agent's authority may be terminated at any time. The agent never "takes over" without the principal's permission. When the power of attorney is "durable," the agent may continue even if the principal is not competent. In this instance the agent is required by law to strictly and dutifully perform only those powers granted. More later on what happens if the agent violated this duty.

The power of attorney is *indispensable* for family members who come to the aid of an elder in time of need. For

example, sorting out insurance denials is impossible with authority. A "no" answer to "Are you the insured?" will quickly terminate a call if the child does not have a power of attorney.

Probate court an alternative, but what does it cost?

Where the elder lacks the simple capacity to name the person who will assist in his affairs, the probate court is available to appoint a guardian or conservator. This formal court proceeding will cost in time and money but is sometimes the only solution. A person may have minimal capacity, but may have no trustworthy person to act. The court will appoint a person who will be supervised and answerable to the probate court.

The probate court is to be considered only after the alternatives are not available. Probate court Form 666 advises the following options be considered first:

- Do not resuscitate order
- Healthcare power of attorney
- Durable power of attorney
- Representative payee

The protection of the court does not come without a price. A few years ago one Westland resident found out the hard way. She wanted to sell her home and move to a condo now that her husband, who used to take care of the house, was in a nursing home. The problem was that she was his court appointed conservator. She had to "petition" the court for permission to sell the house. After eight weeks and almost losing her sale to an eager young family, she got court approval and a bill for over $4,000 in court and legal costs. The cost could have been significantly higher. Single people are especially vulnerable to having large sums of their own money spent on court ordered proceedings. One 85-year-old Detroiter, who had frugally saved all his life, was billed over $10,000 in court approved conservator fees to manage and organize his affairs. He had a nephew who was a retired physician who offered to assist but was turned down by the court. Many seniors have had their homes sold to pay for court appointed guardian and conservator fees. One woman was informed by the court appointed conservator that she had to spend two thirds of her and her husband's life savings on his nursing home bills. The conservator never thought of petitioning the same court for an increase in the wife's asset allowance so that he might qualify for Medicaid and she could retain enough savings for her own financial security.

But, what about elder abuse?

What of the power for *abuse*? We hear of concerns that children may get a power of attorney from parents and then subject them to elder abuse. There are a number of legal points to consider. First, if the elder is not competent when the document is signed, then it is of no effect. A court in a guardian or conservator proceeding may find that the elder did not know what he/she was signing and void the document as well as appoint a guardian. Second, the power of attorney is not often needed since these children have access to bank accounts of the parent by being joint on the bank account. Third, there are *criminal* laws against abuse.

A person who uses a power of attorney is a "person in relationship of trust." If the agent uses the power of attorney to exploit a vulnerable adult, Michigan law provides for punishment up to *10 years in jail* and a fine 3 times the value of the money or property obtained.

In addition the agent who abuses the authority granted may be charged with embezzlement and forgery and receive up to *14 years in jail*.

Elder exploitation is the misuse of an adult's funds, property or personal dignity by another person. If you suspect elder abuse, neglect, or exploitation in a private home or unlicensed facility, notify Department of Human Services (DHS) Protective Services for Adults. Statewide 24-hour Hotline:

1-800-99NOABUSE
1-800 996-6228

In short, the power of attorney is a simple, affordable, wonderful tool for family members to come to the aid of a person in need. If that power is abused there are powerful remedies against those who would try to take advantage of a vulnerable adult. ■